CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF THE MEETING, Public Session

Friday, March 3, 2000

Call to order: Chairman Karen Getman called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:40 a.m. at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Getman, Commissioners, Kathleen Makel and Gordana Swanson were present.

Item #1. Approval of the Minutes of the February 4th, 2000 Commission Meeting.

The minutes of the February 4th, 2000, Commission meeting were distributed to the Commission and made available to the public. There being no objection, the minutes were approved.

Item #2. Public Comment.

Executive Director Bob Tribe introduced John Kepplinger, FPPC Executive Director in 1985, and Dan Stanford, FPPC Chairman in 1983.

Items #9, #10, #11, #12, #13, and #14. Failure to Timely File Statements of Economic Interest - Expedited Procedure.

Commissioner Swanson commented that most of the respondents had committed egregious violations of the FPPC rules, and that she thought the fines were too small, considering the amount of staff time and the expense required to prosecute the cases. She stated her hope that the Commission will discuss the reasons for the amounts of the fines, and consider raising those fines.

Enforcement Chief Cy Rickards responded that, with the new streamlined approach, significantly more compliance has been achieved with much less staff effort in a shorter period of time, but that it could be modified.

Commissioner Swanson clarified that her comments were not meant to be construed negatively toward staff.

Chairman Getman noted that the expedited system was intended to get every public official to file their Statement of Economic Interest as quickly as possible, in order to get it on file during the year in which it matters, so that conflicts of interest can be determined. She agreed that it would be a very good idea to review the policy during the summer of 2000, and consider increasing the fines.

Mr. Rickards pointed out that a public official who has a second charge of violating the PRA will be fined much higher amounts.

There were no objections from the Commission to approve the following items #9, #10, #11, #12, #13, and #14:

Item #9. In the Matter of Bruce Taylor, FPPC No. 99/620.
Item #10. In the Matter of Stanley Holloway, FPPC No. 99/617.
Item #11. In the Matter of Heather Dickinson, FPPC No. 99/678.
Item #12. In the Matter of Joseph Lyons, FPPC No. 99/545.
Item #13. In the Matter of Walter Hughes, FPPC No. 99/547.
Item #14. In the Matter of Valerie Martinez, FPPC No. 99/546.

The items were approved on consent.

Items #15, #16, #17, and #18. Failure to File Statement of Economic Interests.

There were no objections from the Commission to approve the following items #15, #16, #16, and #18:

Item #15. In the Matter of Leticia Soto, FPPC No. 99/328.
Item #16. In the Matter of Patrick Wanta, FPPC No. 98/551.
Item #17. In the Matter of Philip Aplin, FPPC No. 99/337.
Item #18. In the Matter of Nabih Youssef, FPPC No. 99/336.

The items were approved on consent.

Items #19, #20, #21, #22, #23, #24, and #25. Failure to Timely File a Major Donor Campaign Statement - Expedited Procedure:

There were no objections from the Commission to approve the following items #19, #20, #21, #22, #23, #24, and #25:

Item #10. Handling of Requests for Civil Actions Against Major Donors.
Item #11. In the Matter of K. Hovnanian Companies, FPPC No. 99/384.
Item #21. In the Matter of John Otto, FPPC No. 99/411.
Item #22. In the Matter of Richard D. Marconi, FPPC No. 99/403.
Item #23. In the Matter of Tyrone Pike, FPPC No. 99/387.
Item #24. In the Matter of Giant Group, FPPC No. 99/414.
Item #25. In the Matter of Hilmar Cheese Company, FPPC No. 99/368.

The items were approved on consent.

Item #26. Failure to Timely File Campaign Statements. In the Matter of Raquel Olamendi and Committee to Elect Raquel Olamendi, FPPC No. 99/245.

There being no objections, this item was approved on consent.

Mr. Rickards pointed out that there were a significant number of major donor cases which will be brought to the Commission at the April meeting.

Item #6. Adoption of Amendments to Regulation 18427.1 - Notification to Contributors of $5,000 or More.

Technical Assistance Division Chief Carla Wardlow presented the amendment to the Commission. She explained that candidates and committees that receive contributions are required to notify contributors of $5,000 or more that the contributor may have a filing obligation under the Act's major donor provisions. She noted that a provision was added to the Act in 1985 in order to increase compliance with the major donor provisions, and Regulation 18427.1 was adopted to give candidates and their treasurers language to use in the notice advising contributors of $5,000 or more of their reporting requirements. This amendment was proposed in order to make the regulation more user-friendly by providing more information.

Ms. Wardlow stated that the proposed amendment explains the major donor filing requirement, what reports are required to be filed, alerts the contributor to the late contribution reporting period and contains optional language that notifies the contributor that filing electronically with the Secretary of State could be required. She noted that staff recommended adoption of the regulation including the optional language.

Chairman Getman motioned that the Commission adopt regulation 18427.1, including the optional language on electronic filing. Commissioner Makel seconded the motion. There being no objection, the motion passed.

Item #7. First Quarterly Review of CY2000 Regulation Calendar.

Assistant General Counsel Luisa Menchaca introduced the staff's proposed revision to the 2000 Regulation Calendar. She explained that the Commission had approved the original calendar, and planned revisions on a quarterly basis.

Ms. Menchaca noted that staff recommendations were primarily designed to accommodate changes in the scope of conflict of interest regulatory projects. This would include the examination of the "standard of care" issue and further work on other projects, as well as moving up the item on "doing business in the jurisdiction," and other adjustments to the calendar which would ensure a balanced work plan for the staff.

Cynthia Bryant, on behalf of Senator Ross Johnson, noted with disappointment that the mass mailing regulation was not included on the work plan for calendar year 2000.

Chairman Getman responded that there had not yet been a decision about whether the mass mailing regulation would be addressed.

Ms. Menchaca stated that staff had already reduced an eighteen-month conflicts project to a one-year project, and that it has been challenging to address the original issues plus the new conflicts issues which had to be added to the calendar. She noted that it would be difficult to include the mass mailing regulation in the calendar. Ms. Menchaca added that there is an in-house process to look at these issues and incorporate them into the work plan, but that mass mailing was not the only important issue. She stated that the next review would be presented to the Commission in June, and that staff could provide the Commission with other issues which may need consideration.

Chairman Getman noted that it is very important that the conflict of interest regulation program be finished before the current Commissioners leave office. She suggested that the calendar be reviewed in June to determine whether there are other issues can be addressed and still complete the conflict of interest regulation program on schedule.

Commissioner Swanson motioned that the Commission accept the calendar. Chairman Getman seconded the motion. There being no objection, the calendar was approved.

Ms. Menchaca reminded everyone that an Interested Persons' Meeting was scheduled for March 9, 2000, regarding proposed regulatory amendments to regulations that pertain to government code section 84308, as well as the conflict of interest project examining the "standard of care" issues, "public generally" issues and the manner of disqualification. Additionally, she noted that staff recommended that an internal task force be convened, led by project coordinator John Vergelli, that would include representatives from each of the FPPC divisions, and which would ensure that adequate public notice is made and that mailing lists are updated. This process would provide internal and external communication throughout the project and would allow staff to present language to the Commission that would be a consensus of the divisions prior to the Commission's review.

Items #27, #28, #29, and #30.

The following items were taken under consideration without objection:

Item #27. **Report to the Commission from Chairman Getman on the Agency's Activities and Accomplishments in Calendar Year 1999.**
Item #28. **Litigation Report.**
Item #29. **Executive Director's Report.**
Item #30. **Legislative Report.**

Chairman Getman congratulated Enforcement staff, and in particular Senior Commission Counsel Mark Morodomi for their work on the *Snyder* case.

Item #5. Adoption of Proposed Regulation 18232 (Definition of "Income;" Exceptions), and amendment of Regulations 18705 (Standards for Determining Whether a Financial

Effect on an Economic Interest is Material), 18705.3 (Materiality Standard: Economic Interests in Persons Who Are Sources of Income) and 18705.5 (Materiality Standard: Personal Financial Effect).

Chairman Getman clarified that the Commission would not be formally adopting the regulations in accordance with the procedures agreed upon at the beginning of the Phase 2 program. The formal adoption would not take place until all of the conflict of interest regulations have been reviewed, which would probably be in December 2000.

Senior Commission Counsel Larry Woodlock stated that the following decisions made at the January meeting regarding Phase 2 projects E, F and G had received no further comment or substantive dispute: The amendment to 18703.5 which would expressly characterize a public official's personal finances as an economic interest; the amendment to 18703.5 to disregard the personal financial effect rule in decisions affecting real property and business interest investments, preserving the materiality standards applicable to those interests; the decision not to raise the $250 materiality standard for personal financial effects; the decision to move regulation 18705 (c)(1) to 18705.5; and the amendment to 18705.3 to provide an express materiality standard for government agencies which are sources of income.

Attorney Robert Leidigh noted that a sentence on page 5 of staff's memo was incorrect. He warned that even though the wording in the regulation was correct, the summary in the memorandum could lead someone to an incorrect conclusion that the test for materiality should not be used.

Mr. Woodlock agreed with Mr. Leidigh, stating that the language should be, "an effect on the business entity in which an official has an investment," and not the way it was written in the staff memo.

Mr. Woodlock then presented the "government salary exception" definitions under regulation 18232. He explained that use of the word "employee" has come under scrutiny by members of the public because it is not defined in the Act.

Commissioner Deaver joined the meeting at 10:15 a.m.

Mr. Woodlock suggested a clarifying revision to section 18232, which would substitute the term "public official" for each use of the term "employee," in the draft which had been presented to the Commission in January, noting that "public official" is defined to include every member, officer, employee or consultant of a state or local government agency. This change, he suggested, would not affect the substance of the regulation discussed by the Commission in January, and is within the notice provided to the public because it had been made clear that the term "employee" was to have a very broad coverage.

Mr. Woodlock explained that the last sentence of subdivisions (a) and (b) have more language removed related to "employees" and "employee relationships" because the language was not actually necessary and because it was very difficult to remove the "employee"

connotations.

Mr. Woodlock explained that these recommended changes were salutary and without substantive effect and urged the Commission to adopt them.

Scott Hallabrin, from the Assembly Ethics Committee, questioned how a consultant should be treated with regard to the definitions, noting that a consultant is not a salaried employee, but is under contract to the agency. He pointed out that payments received under a contract may or may not be considered salary under the definitions of the regulation.

Mr. Woodlock explained that the regulation is very clear in stating that any and all payments made by a government agency to a public official is salary.

Ms. Menchaca agreed that a consultant under FPPC regulations has filing obligations as a public official, and that it seems equitable that the compensation received should be considered salary and not deemed income.

Mr. Woodlock clarified that the proposed regulation would accomplish that.

Wilda White noted that as a layperson reading the regulation, she would not think that consultant's income would be included in the definition, and recommended that more specific language be adopted if the intent was to include consultants.

Chairman Getman suggested that consultant fees be included.

Commissioner Makel suggested that it include, "such payments include, but are not limited to . . . "

Mr. Woodlock agreed that it would clarify the regulation, but thought that the source of confusion did not originate in the regulation, but in the layperson's difficulty in grasping how a consultant becomes a public official. He added, however, that if the Commission felt that it would make the regulation more clear to include in the list of payments "consultant fees," it could be done. He pointed out that, if a list is too long, a court might construe it to mean that anything not specifically listed was intended to be left out. He did not, however, think that adding "consultant fees" to the list would cause that result.

Chairman Getman suggested a specific cross reference to the definition of "public official" could be included, and that "consultant fees" be included. The sentence under proposed Regulation 18232 (1) would read, "Such payments include wages, consultant's fees, pension benefits, etc."

Mr. Woodlock presented the request from the League of California Cities that the Commission add language to 18232(c) to include as "salary" meals paid for by government agencies. He explained that the League of California Cities (the League) has raised this issue twice before in advice letters, and that the Commission has consistently ruled that meals are gifts

under the Act. Their proposal, he asserted, is inconsistent with existing regulation 18941.1 which defines meals as a gift. Mr. Woodlock noted that the proposal was a substantive change and marked departure from past practice. He expressed his concern that it is inconsistent with a long line of previous advice letters and existing regulations, and that it does not meet the notice provided for both the January and March meetings because it introduces a substantive change.

Chairman Getman clarified that if a public official purchases a meal for a day long meeting and seeks reimbursement for that meal, and the public agency pays for that meal, it is not considered income under subdivision (c). If, however, the agency or nonprofit group pays for the meal directly, it is considered a gift and does not fall within the exception. She observed that currently the exception applies depending on who pays first, and questioned the logic of that policy.

Mr. Woodlock responded that there is a distinction drawn between the provision of meals and the reimbursement of monies spent on meals. The change recommended by the League would be substantive and would take the regulation off of the calendar because it has not been noticed.

Ms. Menchaca added that the League's proposal is beyond the scope of the statutory exception for nonprofit organizations, because the reimbursement language is limited to 501(c)(3) and the language proposed is much broader.

Commissioner Makel presented two scenarios and asked for clarification about the reimbursement definitions.

Mr. Woodlock explained the distinction, and agreed that, under the League's proposal, reimbursement for meals while out on business would be considered income, but that it could include the scenario whereby a person could purchase meals while in the office and those, too, would be considered income. He stated that the League's proposal is motivated by their practice of having off-site meetings where food is provided, but that it is hard to distinguish in principal the difference between an off-site business meeting where food is provided and an office party.

Chairman Getman asked for further clarification, presenting an example of attendance at an off-site meeting whereby attendees pay for their own meals and request reimbursement for those meals. Mr. Woodlock agreed that those reimbursements would not be considered income. If it was the same meeting, Ms. Getman continued, but the agency paid for the meal directly, instead of requiring the extra paperwork of reimbursement, it would be income under the current regulation.

Commissioner Deaver pointed out that the money the League uses for the reimbursements comes from the cities in the form of dues.

Mr. Woodlock responded that the League is a nonprofit entity, under IRS code 501(c)(4) and as such their lobbying activity is not limited. Their proposal requests an exemption that expressly applies to a (c)(3) nonprofit entity, whose lobbying activities are limited, and which

would contradict advice given under the Act, applying to those entities.

Ms. Menchaca agreed that, to be consistent with the statute, it should include "nonprofit membership organization, organized under IRS Code 501(c)(3)." The analysis should be to determine whether the entity making the payment is a local, state, or governmental entity, or a nonprofit organization under IRS Code 501(c)(3). To write a regulation that would apply to entities that are neither governmental entities nor nonprofit under IRS Code 501(c)(3) is beyond the scope of the statute.

Chairman Getman noted that if the Commission chooses to include the League of California Cities proposal to allow the provision of meals for an official to be considered a reimbursement, then it would be treating the League differently than any other group, a policy the Commission has not allowed before.

Michael Martello, City Attorney of Mountain View spoke on behalf of the League's City Attorney Committee. He explained that the League was not looking for special treatment. He suggested that the regulation could be qualified by including, "The provision of meals in the course of a meeting, when that meeting would otherwise be reimbursable can be provided by the nonprofit agency." He noted that this would be encompassed by the notice because it is the same reimbursement. He added that a lot of cities have no budget allowing officials to go to the meeting, and that this regulation would allow them to pay for the airfare.

Ms. Menchaca responded that the language would not accomplish Mr. Martello's purpose, because the statute, under Government Code section 82030(b)(2), allows reimbursement only with respect to IRS Code 501(c)(3), if it becomes exempt from the definition of "income."

Mr. Martello explained that this could be done because it involves all governmental money.

Mr. Woodlock pointed out that the League also receives money from their seminars.

Mr. Martello responded that the seminars are not limited to public officials but that he knew of no one else who attends them. The theory, he thought, was to treat this more like income from a governmental agency. He thought this should be accomplished under 82030(b)(2), focusing on "salary and reimbursement for expenses received from a state, local or federal governmental agency." Mr. Martello explained that the cities pool money, and circulate it back out to pay for air transportation, etc.

Chairman Getman noted that the League is not considered a governmental entity for other purposes, and that they are not an IRS Code 501(c)(3) nonprofit entity, and therefore the proposal cannot be accomplished by regulation unless the League changed their status.

Mr. Martello clarified his argument about the pool of money, adding that the money collected by the League is mostly governmental money, and while some of the money is spent on legislative advocacy, most of it is spent on League committees, reimbursing their members for

airfare and travel expenses.

Ms. Menchaca noted that the proposal is very broad and should be dealt with separately or should be accomplished through a statutory change.

Chairman Getman encouraged Mr. Martello to work with staff to explore other ways to deal with their unique agency.

Robert Leidigh, on behalf of the California School Boards Association, noted that the School Boards face a similar situation as the League, and noted that the key language in January's draft proposal was that the membership for the organizations is limited to dues paying governmental entities. That limiting language, he stated, provided a safety net so that a large loophole would not be created. The California School Boards Association was in support of the original draft that was noticed, and would support the staff draft clarifying "official."

Commissioner Deaver pointed out that there are probably a lot of different organizations with similar circumstances.

Mr. Leidigh agreed, but noted that pooling the money from all members of the organizations allowed members of the organization without the budget to pay for the expenses to participate by paying the expenses from the pool.

Chairman Getman stated that, while she understood their dilemma, she did not agree that an exception should be created in the regulation because there was no statutory authorization to do so.

Chairman Getman motioned that the draft be accepted, with the inclusion of consultant's fees and the cross reference to public officials, but without the last sentence of subsection (c) that begins with, "When a nonprofit membership organization . . . "

Commissioner Deaver seconded the motion, noting that the Commission will go back and explore the issue further.

There being no objection, the motion carried.

Mr. Woodlock noted that advice letters had been issued by the FPPC supporting the notion that the personal financial effect rule will apply, even to income from governmental entities. Those letters contradict the regulatory scheme, he stated. Mr. Woodlock presented fourteen letters which are very frequently cited as authority for the proposition that the personal financial effect rule will abrogate the government salary exception, and recommended that the Commission rescind those letters.

Chairman Getman noted that this issue points out that the law should be interpreted through opinions and regulations, and not through advice letters.

There being no objection, Chairman Getman advised staff to rescind the advice letters.

Chairman Getman adjourned the meeting for a break at 10:57 a.m. The Commission meeting reconvened at 11:15 a.m.

Chairman Getman introduced Kathy Gnekow as the new FPPC General Counsel.

Item #3. Adoption by the Commission of formal opinion requested by William Wood regarding the application of Government Code Section 91013 to electronic filings. (*In re Wood*, No. O-99-315.)

Ms. Menchaca presented the opinion drafted by staff in accordance with the directions of the Commission at the February 4th meeting of the Commission. The opinion concluded that for purposes of imposing penalties for late filing of a statement or report submitted under government code 91013, both the electronic version and the paper version of the statement or report are each considered to be an original.

Chairman Getman motioned that the opinion be adopted as drafted. Commissioner Makel seconded the motion. Commissioners Deaver, Makel, and Swanson voted aye. Chairman Getman voted aye. The motion carried 4-0.

Item #4. and 4.A.

Item #4. Adoption by the Commission of formal opinion requested by the City of Oakland regarding the application of the "legally required participation" rule to Mayor Jerry Brown. (*In re Hicks*, No. O-99-314.)

A. Draft separate opinion by Chairman Getman concurring in part and dissenting in part from the Commission's opinion.

Commission Counsel Deborah Allison presented the opinion drafted by staff in accordance with the concerns and directions of the Commission voiced at the February 4th meeting of the Commission. The draft opinion stated that Oakland Mayor Jerry Brown could not participate in activities related to a potential redevelopment project in the city of Oakland.

Ms. Allison explained that the draft stated that the activities Mayor Brown wanted to participate in did not fit within section 87101 because they were not required for the action or decision to be made. She added that the draft also cites the *Feinstein* opinion and distinguishes it on the basis that *Feinstein* involved the mayor's significant and unique function in the lawmaking process, and that unique function does not apply for those activities that Mayor Brown has described in his request. The opinion also stated that to allow Mayor Brown to participate as requested would be inconsistent with Regulation 18708 because alternative sources of decision exist both within and outside of Oakland's governing structure. Ms. Allison stated that the draft also reflects the Commission's concern that the request does not comply with section 18708(b), which specifically requires that an official who is participating must disclose and describe the financial interest, state a reason as to why an alternative source of decision is not

available, and these disclosures must be made in an open public meeting or a closed public meeting of the governing body.

Ms. Allison summarized Chairman Getman's concurring and dissenting opinion, pointing out that the Chairman concurs with the majority to the extent that the City of Oakland is asking whether Mayor Brown may participate in the lawmaking process, but dissents with the majority in that the Oakland city charter provides no alternative source of decision other than the mayor with respect to administrative and executive decisions. The draft dissenting opinion finds that Mayor Brown can perform some of the activities requested, such as executing a request for a proposal after it has been directed by the city council.

Dan Rossi, representing the Oakland City Attorney's office and speaking on behalf of the City of Oakland, respectfully disagreed with the analysis and the conclusions in the opinion. He argued that the "legally required participation" doctrine must be looked at in light of the purposes and terms of the statute authorizing the decision. That statute, he stated, was the charter of the City of Oakland, which assigns to the mayor the functions of giving direction to the administrative branch of government (headed by the City Manager) and recommending legislation to the city council. Even though the City Manager may also recommend legislation to the City Council, Mr. Rosse argued, the City Manager can only make those recommendations under the direction of the Mayor. He noted that the city charter also assigns a special function over economic development in the city of Oakland.

Mr. Rossi stated that there is no alternative source of decision making in the City of Oakland because there is no other official who can give direction to the City Manager or make recommendations to the City Council, but the Mayor. He noted that both the Mayor and the City Manager are an integral part of the law making process. The lawmaking process in a development deal, he added, is a continuum that begins with identifying and negotiating with a developer, processing an environmental analysis and the planning, as well as presenting a plan to the City Council for approval to proceed with the project.

Mr. Rossi stated that the conflict of interest laws should not supersede the system of government adopted by the voters of a charter city, according the principles of the *Feinstein* case. He added that the Commission's opinion does not conform to that principle.

Wilda White, an Oakland voter, stated that she agreed with the draft opinion, subject to two modifications. She suggested that one sentence regarding the Mayor's election platform was incorrect and irrelevent and should be deleted. She also suggested that footnote 5 on page 7 be deleted, because the statement gives the impression that the opinion is prejudging an issue without benefit of a specific request and without any particular factual situation.

Ms. White disagreed with Mr. Rossi, noting that the city council can direct the Oakland City Manager, and that the charter does not state that the Mayor is to pay a major role in development in Oakland, particularly in the legislative process.

Ms. White commented that the dissent indicated that the "legally required participation"

doctrine allows the Mayor to direct the City Manager, but noted that the decisions are made by the City Council, and that the "legally required participation" doctrine was not an issue under Government Code 87100 because the Mayor would be executing a decision made by the City Council, not making the decision. She also noted that the dissenting opinion relied on extrinsic evidence, and since the city charter is very clear, the rules of statutory construction did not allow the use of extrinsic evidence to interpret the city charter. The conclusions of the dissenting opinion, she stated, went beyond the will of the electorate, and that while the anomalies pointed out in the dissenting opinion are true, those anomalies are not of the Political Reform Act, but of the Oakland city charter.

Commissioner Makel agreed with the majority opinion, but encouraged the Commission to delete the last paragraph of the draft because it relied on regulation 18708 to bolster the conclusion that the exception does not apply in this case, when, in fact, regulation 18708 was irrelevent to the analysis. Regulation 18708 only applies, she argued, to situations where officials are deliberating and making decisions, and is inapplicable to situations where the official is participating.

Ms. Allison noted that the last paragraph was not necessary to reach the conclusion in the opinion. She added, however, that to apply the requirements of Regulation 18708 only to the "making" of decisions could create an anomalous result whereby if an official is participating in a legally required manner, they would not have the same requirements to disclose that the person making the decision would have, and that the person making the decision would be doing it in a much more public and open way.

Commissioner Makel agreed, noting that a new regulation was needed to apply to that situation. Otherwise, she added, the statute allows participating if legally required, but the regulations discourage it because they require that the participation be done in open session and "participating" can include duties such as researching and negotiating which cannot be done in open session.

Commissioner Makel stated that the regulation applies to officials who are making decisions, and is not meant to apply to officials who are participating. She strongly felt that by including the last paragraph in the opinion, the Commission's credibility would be undermined.

Chairman Getman agreed, noting that this regulation would be under review by the Commission under the Phase 2 Project.

Commissioner Deaver suggested that the Commission delete the sentence regarding the Mayor's platform.

Commissioner Swanson agreed, and also recommended deletion of footnote 5.

Commissioner Deaver did not agree with the proposed dissenting opinion because it opened the door for too many interpretations.

Commissioner Swanson stated that the dissenting opinion reflected somewhat her concerns that some of this could be negotiated, but pointed out that Mayor Brown was unwilling to negotiate.

Chairman Getman noted the difficulty of defining "decision," noting that the Commission has defined it broadly over the years, creating an environment whereby an official may not be able to do the duties required of the office. She agreed with the majority that the Mayor could not influence the city council, and stated that her only concern was that the Mayor should be able to implement decisions of the city council. Chairman Getman also disagreed with the point on the Vice-mayor, but would have reached the conclusion on other grounds regardless. She questioned whether her separate opinion was more of a concurrence.

Commissioner Deaver motioned that the Commission approve the opinion, with the elimination of the last paragraph, the elimination of footnote 5, and the elimination of the sentence, "The project would also contribute to reaching the goal of bringing 10,000 new residents to downtown Oakland, a key plank of the Mayor's election platform."

Chairman Getman seconded the motion.

Commissioners Deaver, Makel and Swanson, and Chairman Getman voted aye. The motion passed 4-0.

Chairman Getman announced that she would revise her separate opinion into a concurrence and file it within thirty days and make it available on fax-on-demand and on the FPPC web site.

Item #8. United Farm Workers of America v. Strawberry Commission.

Senior Commission Counsel Larry Woodlock outlined the procedure which would be followed for the testimony. The parties were allowed fifteen minutes to testify, but could reserve part of their time for rebuttal.

Jeff Nelson, representing the United Farm Workers (UFW), chose to divide his time.

Mr. Nelson noted that the Commission approved one of the UFW's proposed amendments at its March 4th meeting, and requested that the UFW and the California Strawberry Commission (CSC) meet and reach a compromise on the second amendment. Since that time, he stated, the UFW has modified the proposed amendment, decreasing the scope of disclosure that was originally requested. Although, Mr. Nelson added, the CSC had issued a policy statement regarding conflict of interest, they had not suggested any amendments to their conflict of interest code which would increase the amount of mandated disclosure.

Mr. Nelson stated the UFW's hope that the Commission would issue a ruling that will

serve as a guide that could also be applied to other agricultural commissions. The UFW's proposal is to broaden the CSC's conflict of interest code to disclose investments and business positions in activities which produce, process or ship fresh fruit and vegetables.

Mr. Nelson stated that the CSC's current code requires disclosure of interests in California Strawberries and the UFW believed that the scope of the disclosure should be broader. He highlighted documents submitted to the Commission by the CSC indicating that its members always represent companies with diverse agricultural interests, and that agricultural commissions, boards and councils governed by conflict of interest codes have conducted cooperative advertising and promotion activities with other agricultural commodities.

Mr. Nelson explained that the CSC's funds are raised by an assessment on California strawberries, and that more than 50% of their funding is spent on marketing. He added that the CSC must decide when and how strawberries are marketed, and that those decisions could affect the marketing of other commodities. Currently, he noted, the conflict of interest code fails to provide information regarding interests in fresh fruits and vegetables, and it fails to provide information regarding interests in strawberries grown outside the state of California. Therefore, he argued, financial interests in other commodities by members of the CSC should be disclosed under the conflict of interest code.

Chairman Getman stated that she understood the competition between strawberries and other fruit, but did not understand the competition between strawberries and vegetables, noting that she saw no connection between strawberries and broccoli.

Mr. Nelson stated that there was intense competition for highly visible shelf space in supermarkets. He noted that he was not aware of co-marketing of fruits with vegetables, but that the competition is with everything in the produce aisle. Mr. Nelson warned the Commission that it would be difficult to delineate particular fruits or vegetables for disclosure. He noted that disclosure of financial interests in fresh fruits or vegetables does not impose a burden and is a simple standard, and that if a CSC member has a financial interest in another agricultural commodity which is competing for shelf space, then that financial interest should be disclosed.

Commissioner Deaver stated that resolving potential conflicts would be a self-policing issue within the CSC and questioned whether there had been any complaints of conflicts.

Commissioner Makel cited that the statute required that the conflict of interest codes provide reasonable assurance that all potential foreseeable conflict situations be disclosed.

Mr. Nelson responded that the UFW would not necessarily know of any complaints and that the CSC's purpose is not just to benefit the strawberry growers, but also the state of California, including the laborers in the fields as well as the communities set up around the strawberry industry.

Wayne Ordos, representing the California Strawberry Commission, requested that he split his time with the President of the CSC, Dave Riggs.

Mr. Ordos stated that the CSC has been working with the Commission since 1994, and

had never been reluctant or hesitant to apply the law to its conflict of interest code and to abide by the legal requirements.

Mr. Ordos did not agree with Commissioner Makel that the law required that all possible or potential financial interests be disclosed. He cited the 1978 Western Growers Association pleading in which the Commission's legal staff noted an overriding limitation of privacy in personal financial affairs. The same pleading also noted that agricultural boards which engage only in commodity promotion functions have even narrower disclosure requirements and it listed those interests. The CSC lists the same interests in their current conflict of interest code.

Mr. Ordos stated that the disclosure categories are limited to require disclosure of only those types of financial interests that might foreseeably be affected by a board's actions. He stated that the limited disclosure complies fully with the standards set forth in *Carmel*, and added that the disclosures must have a rational connection with or bearing on the official's responsibilities or some relationship, direct or indirect, to the official's duties.

Mr. Ordos argued that the scope of the powers of the CSC are very narrow, and that it should not matter if members of the CSC have other financial interests. The CSC, Mr. Ordos continued, approves a budget for marketing and that is approximately the extent of their involvement.

Chairman Getman questioned whether anyone at the Commission reviews the spending.

Mr. Ordos replied that there are committees within the Commission, which some board and staff members participate in, but that the CSC does not micro-manage the promotional campaigns.

Mr. Ordos stated that *Western Growers* litigation and settlement provided the basis for the language that now resides in the overall conflict of interest code for the Department of Food and Agriculture. The CSC derived the language of their conflict of interest code from the conflict of interest code of the Department of Food and Agriculture, as do approximately forty-seven other agricultural commissions.

Mr. Ordos noted that no evidence or corroboration in pleadings has been provided by the UFW supporting the statement that the decisions of the CSC affect and impact profoundly production agriculture in California.

Commissioner Makel observed that section 87309 created a legal standard which required that the Commission not uphold a conflict of interest code if it fails to provide reasonable assurance that all foreseeable potential conflict of interest situations will be disclosed or prevented.

Mr. Ordos stated that there has to be a foreseeable and a material effect with respect to the decision making, and that case law interpreting the codes as in *Carmel* is the prevailing authority with respect to the objective.

Commissioner Makel observed that no copy of the settlement agreement was provided,

but asked Mr. Ordos what his authority was for his argument that the settlement agreement had the effect of freezing the conflict of interest code for all time.

Mr. Ordos responded that in a normal court proceeding, if a body which is a party to a settlement seeks to change the terms of the settlement by changing the language of a code, the other parties involved in the settlement need to be notified, and the body must go back to the arbiter or tribunal before which the settlement occurred.

Mr. Ordos agreed that it is a difficult question, but reminded the Commission that it was neither he nor the CSC that relied on the authority of the *Western Growers* settlement, but that it was the Commission who reminded them of the authority of that settlement when it drafted the Executive Director's opinion.

Chairman Getman asked Mr. Ordos if there is a practical problem with disclosing interests in other fruits and vegetables.

Mr. Ordos cautioned that the Commission should be careful about not exceeding the scope of the applicable law with regard to the permissible scope of any conflict of interest. He explained that it is not the fact that it is burdensome, but that it is not the law. He disagreed that a member of the CSC with a financial interest in an orange grove would have a conflict making a decision about strawberries.

Dave Riggs, President of the CSC, stated that the scope of the activities of the CSC are narrowly defined to benefit California strawberry growers and the California strawberry industry. He noted that their five million dollar budget can only be effective if they are narrowly defined to influence the market for California strawberries. He reminded the Commission that members of the CSC are elected from specific districts throughout the state, and that they are elected to represent the diversity of the strawberry industry in the state.

Mr. Riggs noted that the petition cites changes in the industry that warrant a change in the conflict of interest code, but disagreed that those examples were actually changes, and, in fact, have existed for many years. He added that participation in trade associations is related to specific benefits and objectives to the California strawberry industry that dictates their participation. He clarified that strawberries are marketed year-round in California, and that they aggressively compete for retail space throughout the year for California strawberries. Decisions regarding the timing of promotions for strawberries are not dictated by the CSC.

Chairman Getman read a passage from the CSC 1995 annual report, which reported that the CSC was aggressively targeting promotions in grocery stores and that those efforts have "paid off." She suggested that the statement appeared to contradict what Mr. Riggs had claimed.

Mr. Riggs responded that the issue was whether or not an individual CSC member's interest in another industry would be germane to a decision to encourage the strawberry industry to aggressively promote. He added that for most advisory boards and councils it is assumed that

the member has no interest in the industry being governed by the body. However, the marketing act, he noted, required an interest in the industry in order to serve on the CSC. The *Western Growers* settlement required that an interest in California strawberries must be disclosed in order to serve and take actions on the CSC.

Mr. Riggs stated that the UFW was asserting that the CSC might defer from competition because it might benefit a special interest, and noted that the CSC had never failed to compete.

Commissioner Makel clarified that no one has stated that anyone serving on the CSC has actual conflicts, but that the issue is the legal standard.

Commissioner Swanson noted that the "Berry Patch" was a very strong marketing tool and questioned whether it was part of the issue.

Mr. Riggs explained the genesis of the "Berry Patch" marketing concept and noted that a retailer developed the idea and the CSC agreed that it was a good idea.

Mr. Nelson, of the UFW, pointed out that the CSC was promoting the "Berry Patch" and that the program was good not only for strawberries, but also for other berries. He noted that the CSC co-markets with other commodities and the CSC stated in their brief that it is not out of the ordinary for an agricultural Commission to market cooperatively with other agricultural commodities.

Mr. Nelson reminded the Commission that it already has ruled that it is not bound by the Western Growers Settlement and has issued an amendment to the CSC code, and there did not seem to be any problems from that ruling. He added that there is nothing which should prevent the Commission from doing so again. Mr. Nelson noted that they were not arguing that the CSC failed to promote strawberries, but that the CSC has to make some very specific decisions about when they promote strawberries, that their budget is limited, and that they cannot promote strawberries with the same level of intensity all year so they must plan strategically, and timing is a key concern.

Mr. Nelson referred the Commission to the CSC bylaws which stated that the marketing committee was involved with evaluating and monitoring marketing strategies. He stated that the meetings of the CSC had lively debates and that the CSC was very involved in marketing decisions.

Chairman Getman announced that the Commission would be considering the decision in this case during closed session, and would return to open session following those discussions to present any decision. Any decision in the case would also be published on the web site.

Chairman Getman adjourned the meeting to closed session at 12:30.

Chairman Getman reopened the public meeting at 3:51.

Chairman Getman announced that a unanimous decision had been reached on agenda item 32, the hearing on the appeal by the California Strawberry Commission. That decision was to require an amendment to the California Strawberry Commission's conflict of interest code to read as follows:

1. Investment and business positions in any business entity which during the reporting period:

(b) Was a producer, processor or shipper of fresh fruits.

The meeting adjourned at 4:30 p.m.

Dated: February 22, 2000

Respectfully submitted,

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Sandra A. Johnson
Executive Secretary

Approved by:

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Chairman Getman